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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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PERFECT 10, INC., a California corporation,

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            Plaintiff,

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14   vs.

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GIGANEWS, INC., a Texas corporation; LIVEWIRE SERVICES, INC., a Nevada corporation; and DOES 1 through 100, inclusive,

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            Defendants.

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GIGANEWS, INC., a Texas corporation; LIVEWIRE SERVICES, INC., a Nevada corporation; and DOES 1 through 100, inclusive,

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            Counter-claimants,

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            vs.

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PERFECT 10, INC., a California corporation,

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            Counter-defendant.

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CASE NO. 2:11-CV-07098-ABC-SH

DISCOVERY MATTER
Before Hon. Stephen J. Hillman

JOINT STIPULATION RE PROTECTIVE ORDER PURSUANT TO LOCAL RULE 37-1

Date: December 16, 2013
Time: 2:00 P.M.
Courtroom: 550

Discovery Cut-off: June 30, 2014
Pretrial Conference: January 19, 2015
Trial Date: January 27, 2015

JOINT STIPULATION RE PROTECTIVE ORDER PURSUANT TO LOCAL RULE 37-1

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JOINT STIPULATION RE PROTECTIVE ORDER PURSUANT TO LOCAL RULE 37-1

I.   <u>INTRODUCTION</u>

Pursuant to Fed. R. Civ. P. 36 and Local Rule 37-2.1, Plaintiff Perfect 10 Inc. ("Perfect 10") and Defendants Giganews, Inc. "Giganews" and, Livewire Services, Inc. ("Livewire") (collectively "Defendants") submit the following Joint Stipulation requesting that this Court determine the appropriate protective order applicable to all discovery in this case, *Perfect 10, Inc. v Giganews, Inc.*, CV-11-7098-ABC.

II.   <u>PERFECT 10'S POSITION</u>

Defendants are attempting to prevent Dr. Norman Zada, Perfect 10's president, from accessing highly confidential/attorneys eyes only ("AEO") materials, even though it is aware that this issue has been litigated three times before and in all instances, the Court found that Dr. Zada should have access to all materials[1]. See *Perfect 10, Inc. v. Yandex, Inc.*, Case No. CV-12-1521 WHA (LB) ("*Yandex*"), July 12, 2013 (Dkt. No. 193); *Perfect 10, Inc. v. Google, Inc.*, Case No. CV 04-9484-AHM (SHx) ("*Google*"), December 27, 2005 (Dkt. No. 93); see also *Perfect 10, Inc. v. Rapidshare AG*, Case No. 09-CV-2596 H (WMC) ("*Rapidshare*"), May 17, 2010 (Dkt. No. 66) ("Dr. Zada is a party who has unique significance to the prosecution of the case… Dr. Zada should have access to all material"). In *Google*, this Court found that there was no reasonable likelihood that Dr. Zada would flaunt the strict terms of a protective order. Defendants also know that Dr. Zada has never been accused of violating a protective order. Dr. Zada has been allowed to review all AEO materials in all cases for at least the last eight years.

Perfect 10 is a tiny company with only two employees, Dr. Zada, a former Stanford, UCLA, and Columbia University professor and former IBM Computer Science Research Staff Member, and Melanie Poblete, Perfect 10's in-house paralegal. Perfect 10's business has been destroyed by copyright infringement.

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[1] On October 21, 2013, Perfect 10 provided Defendants with the protective orders from the *Yandex* and *Google* cases. On October 30, 2013, Perfect10 provided Defendants with the protective order from *Rapidshare*.

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1 Because of Perfect 10's very limited resources (its business revenues are less than

2 $70,000/year), Dr. Zada has been forced to do much of Perfect 10's legal work,

3 including producing and reviewing discovery and participating in the drafting of

4 initial versions of briefs, discovery requests and responses, and deposition questions.

5 Dr. Zada will also testify as an expert for Perfect 10 at trial and must be allowed to

6 have access to highly confidential/AEO documents for that reason as well.

7   Defendants have yet to identify *any* basis to exclude Dr. Zada from accessing

8 AEO materials. Perfect 10 is not in the same business as Defendants (alleged

9 infringing paysite operators) and is not a competitor to Defendants[2].

10   Perfect 10 finds Defendants' attempts to smear Dr. Zada by bringing up a

11 number of completely irrelevant issues, highly inappropriate. For example, the SEC

12 matter Defendants improperly refer to came about as a result of an ad that Dr. Zada

13 placed in the Wall Street Journal in 1993 listing his financial competition's top

14 contestants.   Dr. Zada was never accused of fraud, or prevented from continuing to

15 manage money. The primary allegation was that he did not know his clients well

16 enough, before accepting them into his hedge fund, a standard that has since been

17 abandoned by the SEC, as hedge funds are now allowed to operate websites which

18 advertise their availability. The simple fact is that Defendants have failed to provide a

19 single instance where Dr. Zada was ever accused of violating a protective order.

20   Defendants also mistakenly claim that Ms. Lynell Davis and Ms. Natalie Locke

21 are Perfect 10 employees.

22   In order to decrease the burden upon this Court, Perfect 10 first contacted

23

24   [2] Additionally, while Defendants attempt to exclude Dr. Zada and Ms. Poblete

25 from AEO and OAEO materials, Defendants have included language within their

26 proposed protective order to increase the number of officers permitted to view
   "Confidential" materials from 1 allowed for in the *Google* protective order to 3,

27 without providing any basis as to why 3 officers from each, Giganews, Inc. and
   Livewire Services, Inc. should be permitted to view materials provided by Perfect 10

28 and designated "Confidential."

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1   Defendants on October 21, 2013 to negotiate the terms of a stipulated proposed

2   protective order. Perfect 10 indicated that it would require the protective order to

3   allow both Dr. Zada and its in-house paralegal, Ms. Poblete, to see all documents.

4   Perfect 10 has since provided Defendants with the protective orders from the three

5   aforementioned cases and a draft Stipulated [Proposed] Protective Order almost

6   identical to the protective order this Court approved in *Google*, specifically asking

7   Defendants to agree to this previously litigated point. Declaration of Lynell D. Davis

8   ("Davis Decl."), attached hereto as Exhibit A, ¶2. Defendants altered the Perfect 10

9   proposed protective order to render it essentially a new document excluding Dr. Zada

10   and Ms. Poblete from highly confidential/AEO materials; and excluding Dr. Zada,

11   Ms. Poblete and counsel of record (in-house counsel) from viewing information

12   Giganews identified as "Highly Confidential Source Code – OAEO" without

13   providing any basis for their exclusion. Unfortunately, it appears that Defendants

14   have decided that this is an issue best re-litigated before this Court[3].

15   **A.   A separate provision regarding "source code" is unnecessary and**

16   **fails to allow even an attorney of record to review what Giganews**

17   **believes are documents responsive to P10's Requests for Production.**

18   Defendants' additional "OAEO" language regarding "source code" attempts to

19   prevent not only Dr. Zada, but even counsel of record (in-house counsel) and in-house

20   counsel's sole support staff, Ms. Poblete, from reviewing such material. As

21   Defendants know, in-house counsel for Perfect 10 is co-counsel of record in this

22   matter and would not be able to draft pleadings and/or other required documents for

23   this case without the ability to view all documents produced in response to Perfect

24   _____

25   [3] In response to many of Perfect 10's Interrogatories and Requests for Production
     Defendants have noted that they will provide documents following the entry of a
26   "document production management and control order and appropriate protective
     order," given the fact that the deadline to add claims or parties is December 9, 2013,
27   Defendants' insistence on re-litigating the issue of Dr. Zada and Ms. Poblete viewing
     all materials will severely limit Perfect 10's ability to timely add parties.
28

1   10's discovery requests. Additionally, as noted above and previously ruled upon, Dr.

2   Zada is uniquely qualified to review the type of material contemplated within

3   Defendants' separately designated section intended to govern the control of "source

4   code" Defendants may produce. For the same reasons noted above regarding "Highly

5   Confidential/AEO" materials, Dr. Zada should be permitted to review all "source

6   code."

7   Additionally, Perfect 10 believes that the language in the Defendants' proposed

8   protective order regarding source code including but not limited to the language "other

9   software or programs" is sufficiently vague so as to potentially affect the designation

10   of a large category documents and responses and result in multiple discovery disputes.

11   At this time, Perfect 10 is not aware of any Requests that properly call for the

12   production of such materials, nor would Perfect 10 have the time to analyze "source

13   code" written by others. Perfect 10 is concerned that this paragraph has been included

14   in an effort to prevent Dr. Zada from viewing certain materials that are not, in fact,

15   "source code."

16   **B.   Defendants' Suggested "Procedures for Disclosure of Customer**

17   **Information" are time consuming and will require this Court to rule**

18   **on numerous customer objections.**

19   Defendants' proposed language regarding "Procedures for Disclosure of

20   Customer Information" reflects Defendants' continued attempts to withhold

21   documents and/or compliant responses to Perfect 10's discovery requests. The

22   "customers" at issue are in fact massive infringers who Perfect 10 has alleged are

23   either Defendants' employees or third-parties that Defendants have paid to upload

24   billions of dollars of infringing material, including at least 50,000 Perfect 10

25   copyrighted images, either to the servers of giganews.com or to the Usenet.

26   Obviously, all such parties will "object" to their identities being revealed.

27   Thus, Defendants' proposed language would not only result in an indeterminate

28   delay in the discovery of the identity of co-conspirators and other critical information,

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1   it would lead to at least twenty or thirty motions before this Court.   It should also be

2   noted that as part of the repeat infringer/counter notification process as described in

3   Section 512(g)(3)(D) of the DMCA, Defendants should have already provided Perfect

4   10 with the names of most of the alleged infringers as part of the counter-notification

5   process. However, Defendants have yet to provide Perfect 10 with a single counter-

6   notification, and thus never identified any alleged infringer, even though Perfect 10

7   has provided Defendants with at least 1191 Message-IDs in its notices (what

8   Defendants consider to be a compliant notice).

9   Furthermore, Defendants contend that they will disclose the identity of alleged

10   infringers upon receiving a court order. Davis Decl. ¶3.

11   Perfect 10 simply proposes that such "customer" information be designated

12   "Confidential" or "Highly Confidential" resulting in any such information being

13   limited to use in this litigation and only by those individuals identified within Perfect

14   10's [Proposed] Protective Order.

15   **C.   Perfect 10's [Proposed] Protective Order follows precedent.**

16   Perfect 10, in the interest of easing the burden on this Court, provided

17   Defendants with the protective orders imposed in *Yandex*, *Rapidshare* and *Google* as

18   well as a draft protective order that was virtually identical to the *Google* order ruled

19   on by this Court, in the hope of agreeing on a stipulated proposed protective order.

20   Defendants have elected to re-litigate the issue of Dr. Zada's review of all materials

21   disclosed in response to Perfect 10's discovery requests and to add the unnecessary

22   language noted above.

23   Perfect 10's [Proposed] Protective Order does not differ from the *Google*

24   protective order in any substantive respect, in fact, the primary difference reflects

25   Perfect 10's inclusion of some language suggested by Defendants, see for example

26   paragraph 2 of Perfect 10's [Proposed] Protective Order. Davis Decl. ¶2.

27   As such, Perfect 10 asks this Court to rule that Perfect 10's [Proposed]

28   Protective Order in its entirety shall govern all discovery in this case, *Perfect 10, Inc.*

1 *v Giganews, Inc.*, CV-11-7098-ABC.

2 **III.   DEFENDANTS' POSITION**

3   Defendants have grave concerns, as to both substance and form, about Perfect 10's

4 proposed protective order. That proposal has poor organization and is hard to follow,

5 which makes it dangerous to use. Apart from that, the parties have three principal

6 disagreements regarding content. Defendants' proposal is Exhibit B to this

7 Stipulation. For the Court's convenience, Defendants have highlighted the

8 substantive portions they believe that the parties disagree on. Perfect 10 refused to

9 comment on the remaining portions during the pre-motion process.

10   **A.   Section 7: Non-Attorneys Should Not Have Access to Attorneys'**

11   **Eyes Only Materials.**

12   Perfect 10's CEO Norman Zada seeks special non-attorney access to Attorneys'

13 Eyes Only material. This is not Norman Zada's case. The plaintiff is Perfect 10, Inc.,

14 a corporation. While Mr. Zada appears to takes his company's litigation personally,

15 he is not a party.

16   When convenient, Mr. Zada urges courts to give him extraordinary privileges as

17 though he were a plaintiff *in propria persona*. He does not deserve any special

18 treatment.

19   Mr. Zada argues that he is unique among company officers in deserving access

20 to confidential information of a litigation adversary. Mr. Zada may indeed be unusual

21 or perhaps unique – but in ways that counsel precisely *against* allowing him special

22 access to a company's confidential information that normally only lawyers would gain

23 access to. Lawyers have special obligations as officers of the Court, subject to

24 professional ethics rules, that give them extraordinary responsibility with confidential

25 materials they access during litigation. Mr. Zada has no such special responsibility.

26   Mr. Zada has proved himself to be an intemperate copyright crusader. In

27 virtually all of Perfect 10's cases, he blurs the line between his company's case and

28 his personal crusade. In this case, for example, he has tried to bring unrelated parties

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1 and facts into the litigation, referring to other defendants Perfect 10 has sued (such as

2 Megaupload) and to other copyright holders such as Microsoft, whose interests he

3 does not represent. Amended Complaint ¶ 52.

4   At a dinner of the Los Angeles Copyright Society in 2007, Mr. Zada was so

5 agitated during a debate between Perfect 10's litigator and a litigator for Google that

6 Mr. Zada interrupted the debate to take a microphone and insist on haranguing the

7 Google lawyer himself. Declaration of Andrew P. Bridges at ¶ 2. During that event,

8 Perfect 10's lawyer openly solicited other lawyers at the event to bring additional

9 copyright cases against Google. *Id.*

10   Mr. Zada has already, *in this case,* demonstrated that he wants to use

11 information from this case in other contexts. During the pre-motion conference with a

12 Giganews attorney, Mr. Zada on behalf of Perfect 10 demanded materials unrelated to

13 Perfect 10 by explaining that they "would be very interesting reading" and that he

14 would use them to establish the existence of "criminal liability and conspiracy" to

15 infringe other parties' copyrighted works. Rubel Decl. ¶ 3.

16   Furthermore, Defendants learned that Mr. Zada recently held himself out as a

17 witness *for another copyright plaintiff* in a case to which Perfect 10 was not a party.

18 In *Rosen v. iWeb*, Mr. Zada submitted a declaration to help copyright plaintiff Barry

19 Rosen oppose a motion to dismiss his claim. *See* Rubel Decl., ¶ 4, Exhibit 1 (Dkt. No.

20 43-5, 2:13-cv-01742-SJO (C.D. Cal. filed Oct. 11, 2013)). Mr. Zada's testimony there

21 concerned a defendant Perfect 10 was also suing in *Perfect 10 v iWeb Technologies,*

22 case no. 3:313-cv-00328 (S.D. Cal.). In the *Rosen* case, Mr. Zada testified as to

23 "evidence" he had concerning the defendant and his communications with the

24 defendant, and he appeared to be proffering opinions typically offered by experts.

25 Rubel Decl. Exhibit 1 at 1, 5-10.

26   Mr. Zada's activities demonstrate that he not only regularly communicates with

27 other copyright litigants regarding the subject of their respective litigations but also *is*

28 *likely to campaign for others to bring cases, and to advise and testify in others' cases.*

1 This highly unorthodox activity substantially raises the risk that Mr. Zada will

2 improperly use (whether inadvertently or not) highly confidential material from one

3 litigation in an unrelated litigation.

4   Perfect 10's pursuit of discovery unrelated to the claims in this case combined

5 with Mr. Zada's demonstrated history of fostering other plaintiffs' lawsuits

6 demonstrates the danger that Mr. Zada will use discovery in this civil case to gin up

7 civil and criminal litigation against Giganews by other unrelated parties.

8   In addition, Mr. Zada has a track record that includes a censure by the SEC for

9 his misuse of information in connection with his hedge fund marketing activities and

10 his failure to keep appropriate books and records. A copy of the censure order is at

11 http://www.sec.gov/litigation/admin/337560.txt. Moreover, Perfect 10 has a history

12 of maintaining and producing documents in an unorthodox fashion; for example, it

13 frequently resists producing documents in a well-labeled and organized manner in

14 litigation. There is little reason to believe that Perfect 10's principal Mr. Zada would

15 adopt appropriate precautions. This is yet another reason not to trust Mr. Zada with

16 the proper use and maintenance of confidential documents of a Perfect 10 adversary.

17   For all these reasons there is every reason to deny Mr. Zada a special privilege

18 of *non-attorney* access to *attorneys' eyes only* materials.

19   Nor would treating Mr. Zada like any other CEO unfairly prejudice Perfect 10.[4]

20 Perfect 10 misleads the court with the description of its legal activities and finances to

21 suggest that, because of Perfect 10's claimed financial straits, the Court should relax

22 "attorneys' eyes only" rules so that Perfect 10 could save money.

23   Perfect 10 has four counsel of record in this case. In the last decade it has relied

24 upon a number of attorneys to represent it in approximately 30 district court actions

25

26 [4] Perfect 10 argues that litigating the issue of Mr. Zada's access places it in jeopardy

27 of missing the December 9, 2013 deadline to add claims or parties. Because
    Defendants have already offered to stipulate to extend this deadline to January 2014,

28 and Perfect 10 has agreed, this concern is baseless.

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1 (including suits against Visa, MasterCard, Microsoft, Google, and Amazon.com) as

2 well as at least eight appeals and at least three petitions for certiorari to the United

3 States Supreme Court. Perfect 10 has retained many of the biggest names in the

4 country to represent it in litigation. Among the law firms it has retained over the years

5 have been Arnold & Porter, Mitchell Silberberg & Knupp, and Jenner & Block. It

6 even appointed the current Solicitor General of the United States, Donald B. Verrilli,

7 as its lead counsel (among four lawyers) to file an unsuccessful petition for certiorari

8 before the U.S. Supreme Court in *Perfect 10, Inc., v. Visa International Service*

9 *Ass'n*.[5] Mr. Zada also appears (under his former name Norman Zadeh) to have

10 litigated one case personally before this Court (Judge Collins), *Zadeh v. Goodstein*,

11 case no. CV 98-01348-ABC, which he appealed to the Ninth Circuit. Among Mr.

12 Zada's counsel in that case before the Ninth Circuit was John Quinn of the Quinn

13 Emanuel firm.

14   Perfect 10 also falsely states that it has only two employees. According to their

15 notices of appearance in this case (Dkt. 100 and 126), two Perfect 10's counsel of

16 record identified themselves as "Natalie Locke *of Perfect 10, Inc.*" and "Lynell D.

17 Davis *of Perfect 10, Inc.*" (emphasis added), and gave Perfect 10's corporate address

18 (also Mr. Zada's home address) as their business addresses as counsel of record.

19   Moreover, Perfect 10 falsely claims in this motion to have "business revenues"

20 of "less than $70,000/year." It is no pauper, and it spends millions of dollars on

21 litigation. Perfect 10's business is litigation. It has admitted that "it has had

22 settlements in excess of $16 million but that does not include the litigation costs,

23 which were close to the litigation revenues." Answer to Counterclaim (Dkt. 134)

24 ¶ 317. There is no reason to credit Perfect 10's suggestion that for financial reasons it

25 deserves a unique exemption from all the standard protective order attorneys' eyes

26 only limitations.

27 _____

28 [5] *See* cert. pet. No. 07-1026 (denied June 2, 2008), *available at*
    http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/07-1026.htm

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1   **B.**   **Section 8: Perfect 10's Non-Attorney CEO and In-House Legal Team**

2   **Should Not Have Access to Outside Attorneys' Eyes Only Source**

3   **Code.**

4   The parties disagreed as to whether Mr. Zada could view Highly Confidential

5 Source Code – Outside Attorneys' Eyes Only materials. In this joint stipulation,

6 Perfect 10 also proposed special privileges for Lynell Davis and Natalie Locke, in-

7 house counsel for Perfect 10, to have *in-house* access to *outside-attorney-only*

8 materials. Perfect 10 already has two outside counsel of record, and it does not

9 deserve a special exemption from outside-attorney-only restrictions.

10   The same risks defendants described above apply to the even more sensitive

11 information in this category. The Highly Confidential Source Code – OAEO

12 designation would only apply to "source code, including machine code, website

13 scripts, algorithms, and other software or programs of a highly confidential and/or

14 proprietary nature." Defendants seek to protect their proprietary code and trade

15 secrets from employees of a company that has claimed to be Defendants' competitor.

16 *See* Complaint at ¶ 65 ("This conduct enables Defendants to compete directly and

17 unfairly with Perfect 10 . . . .").

18   Although Perfect 10 argues that its discovery requests thus far do not call for

19 any code, a piecemeal protective order that puts off this issue only wastes resources

20 and delays resolution. Given the technical nature of Defendants' systems, it is

21 reasonable to include such a provision now. Furthermore, there is nothing unusual

22 about limiting source code review, in cases that require it, to outside experts and

23 counsel. *See, e.g.*, Eastern District of Texas model Protective Order for patent cases,

24 *available at* http://www.txed.uscourts.gov/cgi-

25 bin/view_document.cgi?document=22242.

26   **C.**   **Section 11: Giganews Must Provide Customers Notice Before**

27   **Disclosure.**

28   The parties disagree as to inclusion of this section, which lays out a procedure

1 for disclosure of customer information. [6]

2   Giganews wants to provide its users, who have an expectation of privacy, an

3 opportunity to intervene and challenge disclosure before their identities are disclosed.

4 Perfect 10 baselessly declares that any individuals at issue are "massive infringers"

5 and thus do not deserve privacy protections, but it offers no real grounds on which to

6 reject this provision. Perfect 10 points out that Giganews informs customers that it

7 will turn over customer information after entry of a court order. But Perfect 10 fails to

8 mention that Giganews also tells its customers that that is the *only* circumstance in

9 which Giganews will turn over customer information. *See* Exhibit 4 (Giganews's

10 Privacy Policy). Giganews's Privacy Policy states: "Giganews requires certain

11 information at the time of signup and in the course of providing member support. This

12 information is necessary for us to provide quality service and support. This

13 information is never released to others, unless we are ordered by a court of competent

14 jurisdiction to do so." *Id.* In addition, Giganews tells its customers that, for civil

15 cases, customers "will be notified so they will have an opportunity to contest the

16 surrender of personal information." *Id.*

17   Giganews's proposed protective order will allow Giganews to provide the

18 customer information Perfect 10 has requested in a timely manner while honoring

19 Giganews's own terms of use. The protective order itself will direct Giganews to

20 provide customer information after two weeks unless the *customer* challenges this

21 court's order.[7] This accords with orders from other courts concerning release of

22 customer information to copyright plaintiffs. *See Canal Street Films v. Does 1-2*, No.

23

24   [6] In addition, Perfect 10 raised for the first time in its joint stipulation a concern
25 regarding access by three officers for each party to view Confidential Designated
   Material. Perfect 10 provides no explanation for this late objection, other than that it
26 differs from a protective order in another, dismissed, case. This is not a reasonable
27 basis. Protective orders in different cases routinely differ.
      [7] The two week period is in line with other service providers. *See, e.g.*,
28 http://www.verizon.net/policies/vzcom/civil_subpoena_popup.asp.

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1   1:13-cv-0999, 2013 WL 1775063, at *4 (M.D. Pa. Apr. 25, 2013) (ordering ISPs to

2   notify customers and to wait 30 days and until after resolution of any customer motion

3   to quash before producing customer information); *see also Mick Haig Productions v.*

4   *Does 1-670*, No. 3:10-cv-1900, 2011 WL 5104095, at *2 (N.D. Tex. Sept. 9, 2011)

5   (court appointed attorneys to represent customers in opposing discovery before

6   disclosure of identity), *affirmed on issue of sanctions against plaintiff's counsel*, 687

7   F.3d 649 (5th Cir. 2012).

8   Defendants' Section 11 presents a reasonable accommodation that allows

9   Defendants to honor their own terms of service prohibiting user disclosures without a

10   court order while providing an efficient mechanism for production of the information

11   Perfect 10 seeks. By contrast, Perfect 10's proposal will ensure excessive motion

12   practice by putting Defendants in a position where they must refuse to disclose user

13   identities until additional motions are filed.

14   **D.   Defendants' Proposal Is Far Clearer than Plaintiff's and Will**

15   **Minimize Inadvertent Error.**

16   A protective order should provide clear instruction to the parties and other

17   persons on how to handle material and information stemming from the case. Perfect

18   10's proposal is a mish-mash of disorganized provisions that is difficult to read and

19   likely to cause confusion for both parties and non-parties.

20   Perfect 10's proposal has only three headings to cover 26 paragraphs:

21   "Confidential Designation of Material" beginning with Paragraph 4, "Highly

22   Confidential Designation of Material" beginning with Paragraph 14, and "Other

23   Provisions" beginning with Paragraph 19. But these headings do not in fact describe

24   the paragraphs beneath each heading, and some paragraphs underneath one heading

25   apply generally throughout the document or belong with provisions under other

26   headings. The paragraphs do not flow in logical order. For instance, the paragraphs

27   covering Highly Confidential Designation of Material" do not immediately follow the

28   paragraphs covering Confidential Designation of Material as might be expected;

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1 instead several unrelated provisions are sandwiched in between, such as procedures

2 for objecting to experts in Paragraph 6, with no additional headings to mark the topic

3 change. Paragraph 11 of Perfect 10's proposed order also includes outdated

4 procedures for filing under seal. Paragraphs 10 and 23 both appear to cover the same

5 topic—the protective order not acting as admission or waiver—but are pages apart in

6 the document and under two different headings.

7   Clear headings and logical organization substantially reduce the risk of

8 misunderstandings or mistakes. Defendant's proposal has rearranged the sections

9 from Perfect 10's proposal into a logical order and added headings for every section

10 for clarity and ease of use.

11   While the byzantine structure of Perfect 10's order likely stemmed from

12 compromises in the *Google* litigation, that is no reason to repeat it. Perfect 10 may be

13 intimately familiar with its details, but neither defendants nor nonparties who read the

14 document will have such familiarity.

15   During the pre-motion process, Perfect 10 offered no explanation or argument

16 for its refusal to agree to a reorganized protective order apart from repeating that it

17 wanted an order identical to that in the Google case. Before conferring with Perfect

18 10, Defendants provided Perfect 10 a redline of Defendants' proposal against the

19 order this Court entered in *Perfect 10 v. Google* and asked Perfect 10 to identify

20 specifically all sections it disagreed with. During the conference Perfect 10 identified

21 only the issues that Defendants have addressed in the earlier sections of this

22 stipulation.

23   The Court should approve Defendants' proposed protective order as a vast

24 improvement upon Perfect 10's proposal.

25 **E.   Defendants' Conclusion**

26   Mr. Zada does not deserve *non-attorney* access to *attorneys' eyes only*

27 materials, and Perfect 10's in-house lawyers and paralegal do not deserve *in-house*

28 access to *outside attorneys' eyes only source code* materials. Giganews needs

1   provisions to allow it to notify customers and allowing them to challenge disclosure

2   before it discloses user information. Defendants' proposed protective order is easier

3   to read, provides more clarity, and has a more logical organization than Perfect 10's

4   proposal. For these reasons, the Court should enter Exhibit B as the protective order

5   in this case.

6   Moreover, Defendants have concerns about Perfect 10's candor in describing

7   personnel as employees or not. Perfect 10 states in this stipulation that its two *in-*

8   *house attorneys are not* employees, yet its *in-house paralegal is* an employee. All

9   three persons appear to work at Perfect 10's office, which is also Norman Zada's

10 home.

11   The exact status of legal personnel as in-house or outside is very important in

12 understanding the effect of a protective order, and the physical location of these legal

13 personnel in the home of Perfect 10's principal raises concerns about the security of

14 highly confidential information. Defendants ask the Court to make specific inquiries

15 and to request detailed representations by Perfect 10's counsel that will clarify all of
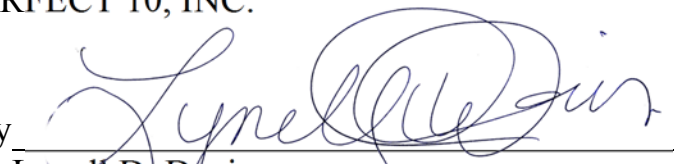
16 these matters.

17 **IV.   CONCLUSION**

18   Counsel for the parties hereby respectfully submit this Joint Stipulation

19 pursuant to Local Rule 37-1.

20 DATED: December 11, 2013   PERFECT 10, INC.

21

22   By_____
                                         Lynell D. Davis
23   Attorney for Plaintiff P10, Inc.

24

25 DATED: December 11, 2013   FENWICK & WEST, LLP

                                      By_____/S/___(pursuant to email)_____
26   Ilana Rubel
27   Attorneys for Defendants GIGANEWS,
                                         INC. and LIVEWIRE SERVICES, INC.
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